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Summary record of the 2798th meeting

Topic:
Shared natural resources

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issues not only of liability but also of responsibility, since impairment could be the result of a wrongful act.

60. Lastly, with regard to article 5, she suggested that the obligation to cooperate, enunciated in paragraph 1, should include a specific reference to such areas of cooperation as environmental protection and sustainable use.

Organization of work of the session (*continued*)*

[Agenda item 1]

61. The CHAIRPERSON said that if he heard no objection he would take it that the Commission wished to establish a Working Group on transboundary groundwaters.

It was so decided.

62. The CHAIRPERSON invited members who wished to participate in the Working Group to inform the Special Rapporteur on the topic of their interest.

The meeting rose at 11.40 a.m.

2798th MEETING

Thursday, 13 May 2004, at 10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Yamada.

Shared natural resources¹ (*continued*) (A/CN.4/537, sect. F, A/CN.4/539 and Add.1²)

[Agenda item 7]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. GAJA thanked the Special Rapporteur for his appraisal of current scientific and technical knowledge relating to groundwaters and his exploration of State practice. He supported the approach the Special Rapporteur had taken to defining the scope of his study, which, in the light of the consultations with technical experts, should focus on transboundary aquifer systems as described in article 2 and extend to other cases that the Special Rapporteur had indicated in his presentation.

* Resumed from the 2792nd meeting.

¹ For a summary of the Commission's work on the subject, see *Yearbook ... 2003*, vol. II (Part Two), chap. IX, pp. 93–95.

² Reproduced in *Yearbook ... 2004*, vol. II (Part One).

2. In view of the connection that most aquifer systems appeared to have with watercourses, a definition that covered only those groundwaters to which the Convention on the Law of the Non-navigational Uses of International Watercourses did not apply would give the study a very limited scope, and that would be particularly regrettable because the Convention did not adequately address certain problems specific to groundwaters. Paragraph 14 of the second report (A/CN.4/539 and Add.1) appeared to suggest that a boundary could be drawn between the topics covered by the Convention and those covered by the new instrument, since the Convention would be interpreted as applying only to those groundwaters that were more closely connected with a river basin. Only then would there be “a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus”, to use the wording of the Convention (art. 2). Such a boundary would not be easy to define and it would imply a restrictive interpretation of the Convention. Moreover, it might not be necessary. The new instrument—whether it took the form of a non-binding instrument, a protocol to the Convention or an independent treaty—could state obligations that were additional to those set out in the Convention on the Law of the Non-navigational Uses of International Watercourses, other treaties or general international law in respect of watercourses.

3. In article 1, the Special Rapporteur proposed that the new instrument should apply “to uses of transboundary aquifer systems and other activities which have or are likely to have an impact on those systems and to measures of protection, preservation and management of those systems”. Some members of the Commission had expressed a preference for a broader text that reasserted the territorial sovereignty of each State over that part of the aquifer that lay beneath its territory. Whether or not the Commission chose to do so, it might be useful to state, if only in the preamble, that territorial sovereignty over groundwaters was not under discussion, whether or not one accepted the principle of Roman law that *dominium* extended *usque ad infera* (“down to hell”).

4. The Special Rapporteur had rightly insisted on the need to examine State legislation and practice before drafting principles. However, it was necessary to have some indication of the content of those principles in order to have a meaningful discussion of obligations relating to aquifers. For example, article 4, paragraph 1, which said that States were under an obligation to “take all appropriate measures to prevent the causing of significant harm to other aquifer system States”, appeared to be based on the premise that there was no obligation to protect aquifer systems *per se*, while the obligation set out in paragraph 3 of that article pertained only to the “natural functioning” of the aquifer, which should not be impaired. As Mr. Mansfield had noted, the issue was an important one, since aquifer systems were either non-renewable or hardly renewable resources. Accordingly, the consideration of articles 4 to 7 should be postponed until the context had been defined and the aforementioned principles had been formulated.

5. Mr. NIEHAUS commended the Special Rapporteur on the quality of his work. Reviewing the background

of the topic, he recalled that it had been included in the Commission's long-term programme of work in 2000.³ As soon as the Special Rapporteur had been appointed, he had stated his intention to carry out a study in stages, submitting an outline in 2003, taking up confined groundwaters in 2004 and oil and gas in 2005, and presenting a comprehensive review of the topic in 2006.⁴ It should therefore be recalled that the questions currently under consideration were related to two other important topics that would be dealt with later: gas and oil. Moreover, other shared natural resources, such as mineral resources, living marine resources and migratory animal species, would not be included in the study, in view of their highly specific characteristics.

6. Turning to the report, he first noted that, at the preceding meeting, several members of the Commission had made important contributions. He thanked Mr. Opertti Badan in particular for his clear and exhaustive explanation and for the document that he had distributed on the foundation for an agreement among the States members of MERCOSUR regarding the Guarani aquifer, and said that he fully endorsed the regional vision reflected in that document.

7. Above all, he supported the idea of deleting the word "shared" so as not to give the impression that what was meant was "shared property". That was a key point that must be extremely clear.

8. Obviously, the articles submitted provided only a general direction and were not ready to be referred to the Drafting Committee. There was no doubt that the Convention on the Law of the Non-navigational Uses of International Watercourses constituted a good normative basis if it was considered that most of the principles it embodied were also applicable to transboundary groundwaters. There were, of course, differences that ought to be taken into account and other principles should be incorporated in the new instrument; in article 3, for example, the text of which would be submitted later. That task would be extremely delicate and complex. He also thought that the topic of "shared" natural resources was closely related to the general principles of environmental law and it seemed likely that, at some point, it would be necessary to spell out which principles would be applicable. Like Ms. Escameia and Mr. Brownlie, he had a problem with the term "significant harm" in article 4. He wondered whether it meant that some harm was acceptable and he wished to know how the harm would be measured and what threshold would be applied for the purpose of the draft articles. That point absolutely must be clarified. As for articles 5, 6 and 7, he endorsed the concurrent comments made by various Commission members at the preceding meeting.

9. There was no doubt that the Commission had a long way to go. The actual legal work would have to take account of some extremely technical considerations as well as some political problems that were not easily solved. He was nevertheless optimistic insofar as the outcome was concerned. He concluded by emphasizing once

again how important it was to regulate appropriately a resource that was of critical importance, not only because it was non-renewable or of socio-economic interest, particularly in arid or semi-arid regions, or because of the consequences of its over-exploitation, the hazards posed by pollution or its contribution to the ecological balance, but also, and above all, because of its direct link to the survival of humankind.

10. Mr. Sreenivasa RAO said the work done by the Special Rapporteur was of high quality. Referring to a remark made by Mr. Niehaus, he said that, as far as terminology was concerned, he was not sure that the use of the word "transboundary" as opposed to the word "shared" completely took away the connotation of property.

11. Although articles 4 to 7 were not ready to be sent to the Drafting Committee, they gave useful indications of the type of principles on which the Commission should reflect. More precise information was needed in certain areas, however, such as the interaction between groundwaters and human activities, in order better to illuminate the relationship of groundwaters to policymaking. Clearly, pollution was a matter that ought to be considered, but its effects on groundwaters were not immediate and the general principles of environmental law might not automatically apply. The words "significant harm" were perfectly appropriate in that context, since no other expression applied to every resource, every activity, every level of socio-economic development, etc. The word "significant" left the door open to an evaluation which would be influenced by the context and which, in any event, was not for the Commission to undertake.

12. Turning to comments on specific points, he asked how the experts referred to in paragraph 19 understood "international regulations". Were they thinking of "standards" or did they mean that all groundwaters must come under an international regulation system, no matter where they were located, how deep they were found or whether they were shared or not? He thought that the first hypothesis should be retained, while the second would probably never be accepted by States. Some explanation of that aspect would be useful.

13. According to paragraph 21 of the report, the fundamental principles applied in the Convention on the Law of the Non-navigational Uses of International Watercourses—namely, reasonable and equitable use and reasonable and equitable participation—should not be automatically applicable to groundwaters. He entirely agreed. The Special Rapporteur had not proposed any article on that subject on the grounds that more study of the matter was required.

14. As to article 4, it seemed to him that the explanation given in paragraph 27 of the report, which was supposed to refer to article 4, paragraph 3, did not match the situation referred to in that paragraph. A case in which a transboundary aquifer system was destroyed seemed to correspond better to paragraph 4 of that article. Indeed, that paragraph did not seem to relate to the principle of prevention because it spoke of a situation where the harm had already been caused.

³ *Yearbook ... 2000*, vol. II (Part Two), p. 131, para. 729.

⁴ *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/533, p. 119, para. 4.

15. With regard to the point raised by the delegation of China⁵ and mentioned in the footnote to paragraph 26 of the report, he said that the practical considerations to which China had referred must be reconciled with the need to preserve water resources for future generations.

16. Referring to the general obligation to cooperate, he said that the wording of article 5 was different from the usual wording according to which States were under an obligation to cooperate in good faith. Article 5 as proposed by the Special Rapporteur based the obligation to cooperate on principles of sovereign equality, territorial integrity, mutual advantage and the good faith of States. It was not clear why a reference was included to territorial integrity, which, at first glance, had nothing to do with the topic.

17. As to the relationship between the different kinds of uses referred to in article 7, more information should be collected before an article on that subject was drafted. Mr. Mansfield had made an interesting comment on that issue when he had asked whether human needs would override custom and treaty obligations. Insofar as vital needs were not equivalent to *jus cogens*, he was not sure that such needs would override custom or agreements.

18. Mr. BROWNLIE said that, when he had spoken about the words “significant harm”, he had not been attacking that concept, but merely suggesting that it was necessary but not sufficient.

19. Mr. MOMTAZ, referring to article 5, said that the question of territorial integrity did not come into play. What it was necessary to know was whether a State was exercising its sovereign rights over the resource in question.

20. Mr. Sreenivasa RAO, replying to the comments by Mr. Brownlie, said that the concept of “significant harm” was merely a standard to be applied. It should not be made more specific, since there were factors in each case that would determine how the concept had to be applied to a given situation. The Commission could not arrive at a universal equation applicable in each case.

21. The CHAIRPERSON, replying to the comment by Mr. Momtaz, said that the question that had to be asked was not whether a State had sovereign control over its resources, since the only possible answer was yes. It must instead be asked how that principle operated in the case of a transboundary resource.

22. Mr. OPERTTI BADAN said that he was concerned about a number of expressions used in the draft articles, including the words “territorial integrity”, whose meaning should be clarified. He had doubts about Mr. Momtaz’s question whether the State exercised sovereignty over its transboundary resources. What happened if the answer to that question was no? He was also not sure how to interpret the provision in article 7 according to which, in the event of a conflict between uses of a transboundary aquifer

system, the conflict was to be resolved with special regard being given to the requirements of vital human needs. It would be helpful if the concept of *jus cogens* referred to in that connection by Mr. Sreenivasa Rao could be applied to water resources and even to oil and gas.

23. Mr. CHEE said he felt that territorial integrity was not the appropriate wording. It was used in the context of security matters. In connection with shared water resources, it would be better to speak of interdependence. Overemphasizing the concept of sovereignty could hinder cooperation.

24. The CHAIRPERSON said that he did not see how the concept of sovereignty could be harmful to cooperation. In his view, it was the foundation of cooperation. He nevertheless agreed that the way in which sovereignty was manifested could constitute an obstacle.

25. Mr. BROWNLIE said that the concept of territorial integrity referred to a territorial space and the frontier which surrounded it. The attribution of territory and of the resources in it and under it was an absolute necessity for determining whether resources were shared and whether the disproportionate extraction of water by one State caused harm to others.

26. Mr. Sreenivasa RAO said that perhaps he should not have referred to *jus cogens*. The best way for States to settle conflicts was to undertake negotiations and, if necessary, to agree to renegotiate existing agreements.

27. Mr. MANSFIELD said that he agreed with Mr. Sreenivasa Rao’s views. When he had raised the question, he had been thinking mainly of the relationship between the two paragraphs of article 7. What took priority, vital human needs or an existing agreement? His question had had nothing to do with *jus cogens*.

28. Mr. YAMADA (Special Rapporteur) said that it was undoubtedly premature to propose draft articles and that he would take the views of the Commission into account in amending them.

29. The question of territorial integrity had been much discussed during the adoption of the Convention on the Law of the Non-navigational Uses of International Watercourses. The same terms were used in article 8 of that Convention and in draft article 5.

30. Mr. PAMBOU-TCHIVOUNDA said that the second report on shared natural resources differed from the first⁶ in that it contained seven draft articles that were not based on developments in doctrine but accompanied by embryonic commentaries, an unusual practice probably inspired by the nature of the topic, which was not primarily a legal topic. He would prefer the words “transboundary groundwaters” to the words “transboundary aquifer system”, which were too erudite. That way, the Commission would have fewer terms to define and the necessary definitions would cover the international nature of groundwater, the type of activities likely to affect it and the kinds of damage that it might sustain.

⁵ See *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee, 20th meeting (A/C.6/58/SR.20)*, and corrigendum, para. 48.

⁶ See 2797th meeting, footnote 4.

31. The second report made a comparison of the topic and that of the law of the non-navigational uses of international watercourses. However, the comparative method had shown its limitations during the study of unilateral acts of States and the responsibility of international organizations. That might discourage the Special Rapporteur from adopting such an approach. In that context, it was disconcerting to use the Convention on the Law of the Non-navigational Uses of International Watercourses and then to depart from it on the important point of the basic principles contained in its part II. The reasons invoked by the Special Rapporteur in paragraphs 21 to 23 of the report for leaving out the principles of equitable use, reasonable utilization and participation by States in management were not convincing; those principles should be included in the text under consideration. Moreover, the Special Rapporteur envisaged the draft articles as a convention, whereas the Commission had on no account decided that the text should take the form of a convention. In any case, if there was to be a convention, it would be necessary to define both its scope and its purpose in one draft article or two separate ones.

32. With regard to scope, express mention should be made of “aquifer system States”, if only because they were the main target group of the regime. The current draft was not specific enough about the concept of “utilization”, which was not clearly defined in the draft articles, about that of “activities which [...] are likely to have an impact on those systems” (art. 1) or about that of “measures” of protection, preservation and management of those systems, which referred to the territorial jurisdiction of the aquifer system State. As to the purpose of the draft articles, the Commission’s work consisted neither in codifying nor in progressively developing the law, but, in a sense, in “legislating”. Was the goal to establish rules or to define applicable principles? That point needed to be settled in the draft articles.

33. Consideration should also be given to the question of liability, which according to the Special Rapporteur (paragraph 28 of the report), should be left to the exercise which the Commission was undertaking “under the topic of ‘International liability for injurious consequences arising out of acts not prohibited by international law’”. As long as the Commission did not settle the question of the nature of the instrument being prepared and the scope of its provisions, however, it could not be ruled out that the liability of the aquifer system State might be incurred because of a breach of one of the obligations provided for in the draft articles.

34. Mr. MATHESON said that, after the first report on shared natural resources, which had illuminated many technical, legal and policy issues, the second report addressed the issue in more concrete terms by presenting draft articles for a convention based on the model of the Convention on the Law of the Non-navigational Uses of International Watercourses. Although it was premature to make any judgement on the form of the draft articles, two options were possible: either a convention containing a set of obligations for States or a set of guidelines with recommendations which States could use for negotiating bilateral agreements, for example. As it was unlikely that the great majority of States would be prepared to ratify a

convention, a set of guidelines would probably be more useful and he therefore suggested that references to “convention” in the text should be replaced by references to “guidelines” and that the provisions should take the form of recommendations.

35. He agreed with the use of the word “significant” in article 4, but believed that it should be left to the States concerned to determine what constituted significant harm. He also agreed that the words “confined transboundary groundwaters” should be replaced by the words “transboundary aquifer system” and that technical definitions should be introduced in article 2. The new terms were more accurate and would make for a more coherent set of provisions. The reference to compensation in article 4, paragraph 4, should be left to the topic on international liability for injurious consequences arising out of acts not prohibited by international law.

36. Article 5 was a useful admonition to States to cooperate on the utilization and protection of aquifers through joint commissions. In the case of North America, he referred to the Treaty between the United States of America and Mexico relating to the utilization of the waters of the Colorado and Tijuana Rivers, and of the Rio Grande (Rio Bravo) from Fort Quitman, Texas, to the Gulf of Mexico, of 1994,⁷ and the Agreement between the United States of America and Canada on Great Lakes water quality, of 1978,⁸ in which bilateral commissions had been created with authority to deal with groundwater uses and contamination. The commentary to article 5 might cite those examples.

37. In respect of article 6, which drew on the Convention on the Law of the Non-navigational Uses of International Watercourses, it might be necessary to have a provision on the protection of national security information and industrial secrets. He agreed with the statement in article 7, paragraph 1, that “In the absence of agreement or custom to the contrary, no use of a transboundary aquifer system enjoys inherent priority over other uses”, but it would be useful to precede that sentence by the statement that “Aquifer system States should jointly address the question of priority of uses in the specific context of the particular system that they share”. It would also be useful, perhaps in the commentary, to have a further explanation of the words “custom” and “vital human needs”. In any case, the Commission should not adopt the draft articles without examining the other parts of the draft, particularly the provisions relating to uses of groundwaters.

38. Mr. CHEE said that the Special Rapporteur had wisely elected to replace the word “shared”, which was a concept of ownership, by the word “transboundary”. He agreed with the decision to use the Convention on the Law of the Non-navigational Uses of International Watercourses as a point of departure, as well as with the words “transboundary aquifer system” eventually retained in article 1. The definitions contained in article 2 were very

⁷ Signed at Washington, D.C., on 3 February 1944 (United Nations, *Treaty Series*, vol. 3, no. 25, p. 313).

⁸ Signed at Ottawa on 22 November 1978 (*United States Treaties and Other International Agreements, 1978-1979*, vol. 30, Part 2, Washington, D.C., United States Government Printing Office, 1980, no. 9257, p. 1383).

useful. With regard to article 4, a number of speakers had expressed doubts about the vague nature of the expression “significant harm”. However, similar wording was used in both the 2001 draft articles on the prevention of transboundary harm from hazardous activities⁹ and article 7 of the Convention on the Law of the Non-navigational Uses of International Watercourses. Article 5, concerning the general obligation to cooperate for aquifer system States, borrowed the wording of article 8 of the Convention; articles 6 and 7 were modelled on articles 9 and 10 of that Convention.

39. He drew the Special Rapporteur’s attention to the work on international groundwaters by ILA, which had prepared draft articles and supplementary articles on that subject, together with commentaries.¹⁰ He hoped that the Special Rapporteur would also address one of the most important issues associated with transboundary aquifer systems, namely pollution. In that connection, more stringent standards might be required than those in article 21 of the Convention on the Law of the Non-navigational Uses of International Watercourses. As to the form that the Commission’s text might take, it might be a framework convention, to be flexibly applied by each region.

40. Mr. MOMTAZ said that the Special Rapporteur’s second report was a big step forward compared to the first. The subject was better defined and it was now clear what course was to be followed. The Special Rapporteur had listened carefully to the Commission and the Sixth Committee.

41. He welcomed the replacement of the words “shared groundwaters” by the words “transboundary groundwaters”. The Special Rapporteur thus stressed the concept of boundaries delimiting the territorial basis on which a State exercised its sovereign rights. He announced from the start the legal nature of the regime which he intended to formulate and which did not disregard the sovereign rights that States exercised under international law in their territory and the subsoil thereof. Mr. Operti Badan’s important comments were based on the same reasoning. There lay the basic difference between the regime under the Convention on the Law of the Non-navigational Uses of International Watercourses and the one being considered by the Special Rapporteur. Whereas, in the former case, water could not be classified as a mineral resource because it flowed in the territory of several States and was renewable, that was not the case with water which was stored under the territory of one or more States and which was not renewable at the same rate as surface water. As recommended by the Special Rapporteur in paragraph 21 of his report, principles such as “reasonable utilization” and “participation by States in an equitable and reasonable manner”, as embodied in the Convention, could not be automatically transposed to the case of groundwaters. The Convention distinguished between upstream and downstream States; the upstream State did not have the right to exclusive use of the waters of the watercourse to the detriment of the downstream State. Needless to say, in the case of groundwaters, the question was completely

different because those resources were treated as mineral resources, just like oil or gas. The question remained as to whether the Special Rapporteur would continue to use the words “shared natural resources” in his future reports.

42. Commenting on the draft articles proposed by the Special Rapporteur, he wondered whether it might not be wiser, in article 1, to replace the word “uses” by the word “exploitation”, which would, in his view, be more in keeping with the characteristics and nature of a groundwater regime; indeed, the word “exploitable” was used in article 2 (a).

43. It would also be better to reverse the order of article 4, paragraphs 1 and 2. In some cases, the activities to which paragraph 2 referred might be undertaken by a State even before the exploitation of the aquifer began. Such a precautionary measure was of a general nature and should not be confined to aquifer system States: the activities of a State which did not share the aquifer might sometimes have adverse consequences for one that did. In such a case, that State could not be exempt from taking the measures referred to in paragraph 2. The same comment applied *mutatis mutandis* to article 5, paragraph 1, with regard to the obligation to cooperate on adequate protection of the transboundary aquifer system and also to article 6, paragraph 3.

44. Article 7 gave rise to a number of problems. The criterion proposed in paragraph 2 of the article did not take account of the fact that the resources in question came under the sovereignty of the State under whose territory those resources were located. Water was a source of life, however, and vital human needs must be given absolute priority. Compensation must nevertheless be provided to the other users, namely States that had had to interrupt their use of the aquifer’s water in order to meet vital human needs.

45. Mr. FOMBA said that the phrase “shared transboundary groundwaters” was problematic from the technical, political and legal points of view. It would thus be sensible to dispense with the word “shared” in the title and retain only the subtitle “transboundary groundwaters”. The statement in paragraph 5 of the report to the effect that further reflection and research on the topic were required before any definitive proposal could be formulated showed that the Special Rapporteur had adopted the right approach. The instrument that was most appropriate to serve as a general framework was undoubtedly the Convention on the Law of the Non-navigational Uses of International Watercourses. That being so, a comparative approach was naturally called for and the Special Rapporteur had therefore been right to come round to the idea that the principles embodied in that Convention were not automatically applicable to groundwaters, opting instead for a *mutatis mutandis* approach. Such an approach was, on the face of it, a simple one, but it also concealed the various pitfalls inherent in the study. The general framework set out in paragraph 8 was acceptable, at first glance, but it was of a provisional nature and would need to be reviewed in line with the research results, once various technical and legal facts had been conclusively established. The Special Rapporteur had been right to refer to the draft articles on prevention of transboundary

⁹ See 2797th meeting, footnote 3.

¹⁰ Rules on International Groundwaters, ILA, *Report of the Sixty-Second Conference* (London, 1987), pp. 251 *et seq.*

harm from hazardous activities, which had been adopted in 2001 and could provide useful guidance.

46. With regard to article 1, the Special Rapporteur had been right to rely on technical data—if, indeed, their accuracy was beyond doubt—and use the terms “aquifer” and “transboundary aquifer system” rather than the terms “groundwaters” and “confined transboundary groundwaters” (paragraphs 11 and 12 of the report). It had also been wise to delete the words “confined”, “unrelated” or “not connected” (para. 13). Such an approach could, however, have the consequence that some groundwaters would be subject to two legal regimes: that of the Convention and that of the draft convention under consideration. Further thought should be given to the question; the Special Rapporteur’s proposal that a separate article might be devoted to it had considerable merit. He shared the Special Rapporteur’s view that activities other than uses of such resources should be regulated. He saw little difference, however, between the phrases “which have or are likely to have” and “which involve a risk of causing”. The real question was whether the consequences should be potential or actual.

47. With regard to article 2, it would be interesting to know the arguments underlying the view of some groundwater experts that all categories of aquifer, regardless of whether they were domestic or transboundary, must be subject to international regulations (para. 19). It seemed questionable, on the face of it, as to whether the principle of the compulsory internationalization of such aquifers was desirable, whatever their nature and size, or whether they should be claimed as part of the common heritage of mankind, which would call into question the principle of the permanent sovereignty of States over their natural resources. In that regard, he had listened with interest to Mr. Operti Badan’s argument in defence of the territorial approach. He shared the view that only transboundary aquifers should be regulated. Assuming that he had correctly understood the technical foundation of the proposed wording, he believed that it constituted a good basis for the Commission’s work. The Special Rapporteur seemed to be of the same opinion, judging by his comment, in paragraph 20 of the report, that the definition of terms would need to be revisited after the context of the uses of the terms in the substantive provisions had been determined and that the definition of additional terms might also be required.

48. As for the principles governing the use of aquifer systems, the basic aim must be to draw a clear distinction between the subject of international watercourses and that of aquifer systems. The Special Rapporteur rightly considered that the basic principles contained in article 5 of the Convention on the Law of the Non-navigational Uses of International Watercourses concerning “equitable use” and “reasonable utilization” should not be automatically transposed to groundwaters. Equitable and reasonable participation by States in the management of transboundary aquifer systems should also be further considered; it should be established whether there was a clear and sufficiently established practice.

49. Draft article 4, which related to the obligation not to cause harm, raised the question of the threshold of

harm and whether there was a difference in nature and/or degree between causing harm to international watercourses and causing harm to groundwaters. The answer to that question would enable the Commission to find the best legal formula. In paragraph 25 of the report, the Special Rapporteur argued in favour of fixing the threshold lower than “significant” harm. The logical conclusion would be to delete the word “significant”, but the Special Rapporteur had not done so, on the grounds that the concept had the advantage of being flexible and comparative. Given that the concept gave more weight to the qualitative than to the quantitative aspect of harm, his view was worth further consideration. The question raised in paragraph 3 of article 4 concerning the impairment of the natural functioning of transboundary aquifer systems was important and should be examined more closely. As for the question of where to insert the paragraph, it would seem logical to include it in part IV, which dealt with preservation. With regard to the question of international liability and compensation, the prevention aspect should undoubtedly be complemented by the liability aspect and the Commission should therefore consider how best to link it with the topic of liability. The Special Rapporteur’s proposal in that regard merited close examination.

50. Referring to article 5, he said that the use of the word “appropriate” rather than the word “optimum” (paragraph 30 of the report) was acceptable, insofar as the word seemed to hark back to the idea of the risk of the depletion of non-renewable resources. Article 6, on the other hand, was concerned only with data and information on the condition of aquifer systems. He wondered whether paragraph 2, which had no equivalent in article 9 of the Convention, was really necessary. The basic idea underlying the paragraph, which was to collect and generate new data and information, seemed to be covered, if only implicitly, in paragraph 1, since the obligation to exchange data and information on a regular basis surely implied that such data and information would be published. As to data and information on uses and other activities of transboundary aquifer systems and their impact, the suggestion that they should be dealt with in part III, “Activities affecting other States”, seemed sensible.

51. Article 7, concerning the relationship between different kinds of uses, provided a good basis for reflection, but it would need to be reviewed in the light of the final formulation of the principles governing the use of aquifer systems and the factors to be taken into account in implementing such principles.

52. Mr. ECONOMIDES thanked Mr. Operti Badan for the information that he had provided on the Guarani aquifer system, which would be extremely relevant to the Commission’s work. With regard to the scope of the draft articles, he had no hesitation in endorsing the new term “transboundary aquifer system” and the deletion of the words “confined”, “unrelated” and “not connected”. In his view, however, additional information was needed on the groundwaters with which the Commission proposed to deal. Mr. Pambou-Tchivounda had suggested retaining the expression “transboundary groundwaters”, but the draft articles were clearly concerned only with waters contained in aquifers or very close to aquifers. He found

disconcerting the Special Rapporteur's assertion that some groundwaters could be covered both by the 1997 Convention and by the draft articles under consideration. The question would naturally have to be considered in the future, but, for his part, he would have preferred that some part of the draft articles should specify which groundwaters were expressly excluded from their scope, in order to provide an even more precise definition of the topic.

53. With regard to article 1, he thought that the wording suggested by Mr. Mansfield was an improvement on the existing text. Although it was too soon to talk of drafting changes, he wondered whether the word "uses" should not refer to the water contained in an aquifer system rather than to the aquifer system itself. He requested guidance on that point from the Special Rapporteur. In his view, it seemed more logical to speak of the uses of water.

54. The word "exploitable" in article 2 (a) required further explanation. Firstly, he wondered what volume of water an aquifer should contain to be considered exploitable. Secondly, the opportunities for exploitation could vary from one country to another, as could the legislation governing the exploitation of aquifers. Moreover, if the volume of the water contained in a given transboundary aquifer system was not sufficient for it to be exploited, he wondered whether it would be covered by the instrument under consideration and, if not, what regime it would be covered by. As for the principles governing the uses of aquifer systems, he understood that the Special Rapporteur wished to examine the question in greater depth, but personally he was confident that water deriving from a transboundary aquifer system also constituted a shared natural resource. He endorsed the views expressed by Mr. Sreenivasa Rao in that regard: the word "shared" emphasized that the aquifer was not subject to the exclusive sovereignty of a State and that, whether the term used was "shared natural resources" or "transboundary aquifers", the situation remained the same. In any case, territorial sovereignty was not involved. The very term "transboundary aquifers" meant that a State could not have exclusive sovereign jurisdiction and that other States also had sovereign rights with regard to the aquifer.

55. With regard to article 4, he agreed with Mr. Brownlie that the concept of "significant harm" was rather vague and uncertain. He also shared the view expressed by other members of the Commission that greater attention should be paid to harm caused to groundwaters, owing to their vulnerability to pollution, particularly since far less information was available concerning such groundwaters than concerning the waters of international rivers. Given that the waters in question were very vulnerable and mostly non-renewable, he wondered whether the word "significant" did not constitute too great an obstacle. After all, even minimal or insignificant harm should be prohibited and should not be repeated. In article 4, paragraph 3, the word "impair" posed a serious problem that had already been mentioned. The paragraph was inconsistent with the commentary to it, which appeared in paragraph 27 of the report and referred not to impairment, but to the permanent destruction of a transboundary aquifer system. The paragraph was unacceptable as currently worded. As for the question of international responsibility, he acknowledged that the draft articles on international liability for

injurious consequences arising out of acts not prohibited by international law would apply, but he shared Mr. Pambou-Tchivounda's view that if the accepted threshold of harm was exceeded, the issue became one of responsibility for an internationally wrongful act rather than one of liability.

56. Article 5, paragraph 2 was too weak, in his view, and should be strengthened, especially the phrase "as deemed necessary by them".

57. Lastly, the two paragraphs of article 7 should be amalgamated. The resulting text should be worded along the following lines: "In the event of a conflict between uses of a transboundary aquifer system, it shall be resolved, in the absence of agreement or custom to the contrary, with special regard being given to the requirements of vital human needs." Vital human needs should, of course, have priority over any other use. In his view, it was premature to deal with the issue of the form that the draft articles should take.

The meeting rose at 1.05 p.m.

2799th MEETING

Friday, 14 May 2004, at 10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Yamada.

Cooperation with other bodies

[Agenda item 10]

STATEMENT BY THE OBSERVER FOR THE COUNCIL OF EUROPE

1. The CHAIRPERSON welcomed Mr. de Vel, Director-General of Legal Affairs of the Council of Europe, and Mr. Benítez, Deputy Head of the Public Law Department of the Directorate-General of Legal Affairs of the Council of Europe, and invited the former to address the Commission.

2. Mr. de VEL (Observer for the Council of Europe) said that he welcomed the opportunity to attend the Commission's fifty-sixth session in person, a mark of the importance that the Council attached to the Commission's work and to its cooperation with it. He wished briefly to review a number of recent developments in the Council of Europe that might be of interest to the Commission. Two documents had been prepared for the Commission's